

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF OKLAHOMA

DOMINIQUE TABB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-11-433-JHP-SPS
	)	
CLAUDE JONES, et al.,	)	
	)	
Defendants.	)	

**DEFENDANTS' JOINT MOTION FOR CONFESSION OF JUDGMENT**

Defendants Claude Jones, Ed Drury, Tim Tierney, and Brian Simpson ("Defendants") move this Court to grant Defendants summary judgment as confessed pursuant to LCvR 7.1(h) of the Eastern District of Oklahoma for Plaintiff's failure to timely oppose Defendants' Amended Joint Motion for Summary Judgment [Dkt. 97] filed on October 28, 2014. In support thereof, Defendants submit the following Brief.

**ARGUMENT AND AUTHORITY**

**PROPOSITION I:**

**Defendants' Amended Joint Motion for Summary Judgment [Dkt. 97]  
should be deemed delivered Pursuant to Rule 5.**

Defendants have mailed their Amended Joint Motion for Summary Judgment by Certified Mail to Plaintiff's last known address on two occasions. (See Exhibit "1," United States Postal Service Tracking information, Exhibit "2," United States Postal Service Tracking information). However, Plaintiff has not signed for receipt of said motion sent by certified mail. (See Ex. 1, Ex. 2). The first attempt to serve this mailing was on October 30, 2014 with the second attempt occurring on November 14, 2014. Because Defendants have

complied with the Federal Rules of Civil Procedure and this Court's Local Rules, Defendants' Amended Joint Motion for Summary Judgment should be deemed delivered.

According to Rule 5(a)(1)(D) of the Federal Rules of Civil Procedure, a party filing a written motion, except one that may be heard ex parte, must be served on the opposing party. Rule 5(b)(2)(C), provides that a paper is served under Rule 5 upon "mailing it to the person's last known address—in which event service is complete upon mailing."

Defendants' Amended Joint Motion for Summary Judgment should be deemed delivered. As of October 28, 2014, when Defendants mailed their Amended Joint Motion for Summary Judgment, Plaintiff's last known address was 6611 S. Zunis Ave., Unit 2204 Tulsa, Oklahoma 74136. [See Dkt. 94]. However, when the United States Postal Service attempted to serve Plaintiff on October 30, 2014, "a notice was left because an authorized recipient was not available." (Ex. 1). Under Rule 5(b)(2)(C), service was completed on October 28, 2014 when Defendants' Amended Joint Motion for Summary Judgment was mailed.

However, Defendants, to ensure Plaintiff received Defendants' Amended Joint Motion for Summary Judgment, instructed the United States Postal Service to attempt to deliver it again. (Ex. 2). Again, on November 14, 2014, "a notice was left because an authorized recipient was not available." (Ex. 2). Therefore, because Defendant mailed Defendants' Amended Joint Motion for Summary Judgment to Plaintiff's last known address, it should be deemed served.

If Plaintiff did change his address or otherwise no longer resides at this last known address, he has failed to comply with the Local Rules of the Eastern District of Oklahoma. LCvR 5.5(a) and (b) provide:

(a) All papers shall contain the name, mailing address, daytime telephone number, fax number, and email address, if any, of the attorney or pro se litigant. If any of this information changes, the attorney or pro se litigant must notify the Court by filing the form provided by the Clerk and serving a copy on opposing counsel or pro se parties. Papers sent by the Court will be deemed delivered if sent to the last know (sic) address given to the Court. If applicable, the attorney is further required to comply with ECF Policy Manual procedures regarding Change of Contact Information.

(b) Proof of service of any papers required to be served shall be made by the certificate of any attorney of record or pro se litigant, or if made by any other person, the affidavit of such person.

LCvR 5.5(a) imposes a duty on a pro se litigant to notify the Court and opposing counsel of his change in address. In fact, Plaintiff has previously illustrated his knowledge of LCvR 5.5(a). On two occasions, Plaintiff has filed a "Notice of Change of Address." [Dkt. 11 & 94]. Thus, if Plaintiff has changed his address, it is clear Plaintiff knows of LCvR 5.5(a), and his duty to notify the Court and opposing counsel of his change of address.

Defendants' Amended Joint Motion for Summary Judgment should be deemed served on Plaintiff.

## **PROPOSITION II:**

### **Judgment Should be Confessed pursuant to LCvR 7.1.**

Plaintiff has failed to timely respond to Defendants' Motion for Summary Judgment [Dkt. 97] which was electronically filed in the Eastern District of Oklahoma on October 28, 2014. LCvR 7.1(f) of the Eastern District of Oklahoma provides in pertinent part:

...Each party opposing a motion or objection shall file with the Court Clerk and serve upon all other parties a response within fourteen (14) days, which includes three days for mailing, if applicable from the date the motion or objection was filed...

Accordingly, Plaintiff's Response to Defendants' Motion for Summary Judgment was due to be filed on November 11, 2014.

LCvR 7.1(h) of the Eastern District of Oklahoma specifically addresses unopposed dispositive motions and provides as follows:

If a dispositive motion is not opposed, the Court may in its discretion either (1) provide an additional fourteen (14) days, after which the case will be dismissed or the motion will be deemed confessed, as appropriate, or, (2) in the event the moving party has filed a motion for confession of judgment, such motion may be granted following fourteen (14) days after filing. In either event, in the discretion of the Court, the party failing to respond shall be subject to sanctions, including but not limited to all attorney fees and costs incurred by the moving party in connection with such failure to timely oppose the motion.

Plaintiff has failed to timely respond to Defendants' Motion for Summary Judgment and Defendants have filed this Motion for Confession of Judgment pursuant to LCvR 7.1(h), thus Defendants request this Court grant Defendants' Amended Joint Motion for Summary Judgment following fourteen (14) days after this filing.

WHEREFORE, premises considered, Defendants Claude Jones, Ed Drury, Tim Tierney, and Brian Simpson respectfully request the Court to grant their Amended Joint Motion for Summary Judgment pursuant to LCvR 7.1(h) following fourteen (14) days after filing of this Motion for Confession of Judgment. Defendants also request all attorney fees and costs incurred in connection with Plaintiff's failure to timely oppose Defendants' Amended Joint Motion for Summary Judgment [Dkt. 97] as provided in LCvR 7.1(h).

Respectfully submitted,

s/ Stephen L. Geries

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ATTORNEYS FOR DEFENDANT  
Brian Simpson

**CERTIFICATE OF SERVICE**

I hereby certify that on November 25, 2014, I served the attached document by regular U.S. mail, postage prepaid, to the following who is not a registered participant of the ECF System:

Dominique Tabb, Inmate #495135  
6611 S. Zunis Ave, Unit 2204  
Tulsa, OK 74136  
*Pro Se Plaintiff*

I hereby certify that on November 25, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Randall J. Wood, Esq. - via electronic mail at: [rwood@piercecouch.com](mailto:rwood@piercecouch.com)  
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